PART IV: SUMMARY OF DECISIONS

A. JURISDICTION

(1) Federal Preemption

Under the doctrine of federal preemption, where there is a grant of power to the federal government in a field that requires a uniform system of regulation and the federal government has exercised that power, the states are barred from entering or regulating the field. *Foley, Hoag & Elliot*, 2 MLC 1302 (1976). In the field of labor relations, the National Labor Relations Act, 29 U.S.C. §151, *et seq*. (NLRA), covers employers engaged in interstate commerce and, therefore, generally preempts any state labor relations law.

Section 2(2) of the NLRA, excludes, *inter alia*, states and other "political subdivisions" from coverage. Further, whether an entity is a “political subdivision” depends on federal, not state law. *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600, 77 LRRM 2348 (1971).

Section 14(c)(1) of the NLRA also permits the NLRB to decline to assert jurisdiction over any class or category of employers "where, in the opinion of the [NLRB], the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction." Pursuant to Section 14(c)(2) of the NLRA, where the NLRB has declined to assert jurisdiction pursuant to Section 14(c)(1), the Commission may assert jurisdiction under M.G.L. c.150A. *See*, M.G.L. c.150A, §10(b); *Operations and Maintenance Service Westover Jobs Corps. Center/G.E. v. Labor Relations Commission*, 405 Mass. 214 (1989). For example, the NLRB has declined to exercise jurisdiction pursuant to Section 14(c)(1) over the horseracing and dog racing industries. *See*, *NLRB Rules and Regulations*, Part 103.3. The NLRB has also declined jurisdiction over day care centers with less than $250,000 in gross annual revenues. *See, e.g.*, *Salt & Pepper Nursery School & Kindergarten No. 2*, 222 NLRB 1295, 91 LRRM 1338 (1976). Accordingly, the Commission has jurisdiction over employers in those industries. *See*, *Greater New Bedford Infant Toddler Center*, 12 MLC 1131 (H.O. 1985), *aff’d*, 13 MLC 1620 (1987). However, the Commission will normally refrain from acting in any matter that is arguably within the jurisdiction of the NLRB until the NLRB has specifically declined to assert jurisdiction.

Prior to 1995, the NLRB considered whether an employer lacked the ultimate authority to determine primary terms and conditions of employment when deciding whether to decline jurisdiction pursuant to Section 14(c). *See*, *Res-Care, Inc*., 280 NLRB 67, 122 LRRM 1265 (1986). However, in *Management Training Corporation*, 317 NLRB 1355, 149 LRRM 1313 (1995) *reconsideration denied*, 320 NLRB 131, 151 LRRM 1226 (1995), the NLRB determined that the employer control test used in *Res-Care* was “unworkable and unrealistic.” Instead, the NLRB determined that “whether there are sufficient employment matters over which unions and employers can bargain is a question better left to the parties at the bargaining table and, ultimately, to the employee voters in each case.” 317 NLRB at 1355.

Whether the NLRB declines jurisdiction on the ground that the employer is a "political subdivision" or declines jurisdiction pursuant to Section 14(c)(1) of the NLRA, the Commission will make its own determination about whether an entity is a "public employer" within the meaning of M.G.L. c.150E, §1. *See*, *Franklin Institute of Boston*, 12 MLC 1063 (1985)(NLRB's determination that entity was a "political subdivision" within the meaning of the NLRA not dispositive of Commission's consideration whether entity is a "public employer" within the meaning of M.G.L. c.150E, §1*)*. For more information concerning whether a particular entity is a public or private employer, *see* paragraph B(1), below.

(2) Parallel Jurisdiction

The Commission and the Civil Service Commission have parallel jurisdiction in certain limited areas. The Civil Service Commission cannot act as a substitute for the Commission in cases where civil service employees allege a violation of M.G.L. c.150E. The Supreme Judicial Court has held that the Civil Service Commission vindicates a private right of a complaining employee. On the other hand, the Commission, although it does not initiate the action, acts as a public prosecutor to test a public right*. Town of Dedham v. Labor Relations Commission*, 365 Mass. 392 (1974). Therefore, even if the Civil Service Commission had previously found that a public employer had just cause for disciplining an employee, the Commission may examine the facts to determine whether the discipline was imposed in retaliation for the employee's participation in activities protected by M.G.L. c.150E*. Board of Selectmen v. Labor Relations Commission*, 16 Mass. App. Ct. 972 (1983); *See also*, *Town of Dedham*, 21 MLC 1015 (1994)(consent order entered into by employer and Massachusetts Commission Against Discrimination (MCAD) changing employee's seniority date does not deprive Labor Relations Commission of jurisdiction over claim by union that employer failed to bargain in good faith in violation of M.G.L. c.150E over impacts of consent order on members of bargaining unit); *Newton School Committee*, 8 MLC 1538 (1981)(Commission considers determination by Department of Employment and Training that laid off employees were entitled to receive unemployment compensation, but such evidence does not establish *prima facie* evidence that employees had mitigated their damages as required by M.G.L. c.150E). For a discussion of the effect that an arbitration proceeding or award may have on a Commission proceeding, *see* paragraph K(2), below.

(3) Primary Jurisdiction

The doctrine of primary jurisdiction dictates that a court should normally defer action on a case when the subject matter of the case is within the jurisdiction and expertise of an administrative agency in order to permit the agency to first decide the case. In *Leahy v. Local 1526, American Federation of State, County, and Municipal Employees*, 399 Mass. 341 (1987), the Supreme Judicial Court held that breach of the duty of fair representation was a prohibited practice and that, consequently, cases raising the duty of fair representation should normally be decided by the Commission in the first instance. *See also*, *Johnston v. School Committee of Watertown*, 404 Mass. 23 (1989)(where there are genuine issues of material fact requiring the Commission's expertise, Commission has

primary jurisdiction over labor dispute involving union's duty of fair representation); *Ash v. Police Commissioner of Boston*, 11 Mass. App. Ct. 650 (1981)(plaintiff's action alleging anti-union discrimination dismissed because claim was within the Commission's prohibited practice jurisdiction and plaintiff had not pursued claim before the Commission). The Court has also held that, because a union's assessment of an agency service fee in excess of the amount legally permitted by M.G.L. c.150E, §12 is a prohibited practice, those claims are within the Commission's primary jurisdiction. *School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70 (1982).

B. DEFINITIONS

(1) “Employer”

M.G.L. c.150E, §1 defines the term "employer" or "public employer" as the Commonwealth, acting through the commissioner of administration, or any county, city, town, district, or other political subdivision acting through its chief executive officer. M.G.L. c.150E, §1 excludes authorities created pursuant to M.G.L. c.161A, establishing the Massachusetts Bay Transportation Authority (MBTA), and those authorities included under the provisions of Chapter 760 of the Acts of 1962 (Massachusetts Turnpike Authority, Massachusetts Port Authority, Massachusetts Parking Authority, and Wood's Hole, Martha's Vineyard and Nantucket Steamship Authority). For a further discussion about authorities, *see* paragraph B(1)(c), below.

(a) State Employees

Subject to certain statutory exceptions, the Commonwealth, acting through the commissioner of administration, is the "employer" of all state employees. *Massachusetts Probation Ass'n v. Commissioner of Administration*, 370 Mass. 651 (1976); *See also*, *Commonwealth of Massachusetts*, 23 MLC 117 (1996). Those exceptions are:

- the Board of Higher Education, which is the employer for all employees of the system of public institutions of higher education, except that the Board of Trustees of the University of Massachusetts is the employer for employees of the University of Massachusetts;

- the Chief Administrative Justice of the Trial Court, which is the employer for all judicial employees;

- the State Lottery Commission, which is the employer for State Lottery Commission employees;

- the Massachusetts Water Resources Authority, which is the employer for Massachusetts Water Resources Authority employees

(b) County Employees

With certain exceptions (see below), the *county* is the employer for all county employees. Further, where two independently elected county officials (or boards) exercise control over the terms and conditions of employment, those officials (or boards) are "joint chief executive officers." *Essex County*, 22 MLC 1556(1996)(county commissioners and county sheriffs are joint chief executive officers); *Essex Agricultural and Technical Institute*, 4 MLC 1755 (1978)(county commissioners and trustees of county agricultural and technical school are joint chief executive officers).

Prior to 1992, the Suffolk County House of Correction employees were employees of the City of Boston. *See*, *City of Boston/Deer Island House of Correction*, 19 MLC 1613, 1614, n.2 (1992). In 1992, those employees were transferred to the Suffolk County Sheriff's Department, and in 1995, the legislature amended M.G.L. c.150E, §1 to define the Suffolk County Sheriff as the employer of employees of the Suffolk County Sheriff's Department. *See*, Chapter 39, Section 10 of the Acts of 1995.

In 1997 and 1998, the legislature abolished the counties of Middlesex, Hampden, Worcester, Hampshire, Essex, and Berkshire. *See*, Chapter 48 of the Acts of 1997, as amended by Chapter 300, of the Acts of 1998. In the case of former registry of deeds employees in the abolished counties and former registry of deeds employees of the Suffolk County Registry of Deeds, the employer is the Secretary of the Commonwealth. *See*, Chapter 48, Sections 11-12 of the Acts of 1997, as amended by Chapter 300, Sections 25-28 of the Acts of 1998. However, although county correctional officers in the abolished counties were similarly transferred to the Commonwealth, the employer of those correctional officers is the county sheriff. *See*, Chapter 49, Section 14 of the Acts of 1997; *Worcester County Sheriff's Department*, 28 MLC 1 (2001).

(c) Authorities

Although employees of certain public authorities are *public* employees, many are covered by M.G.L. c.150A, which primarily covers private sector employees. M.G.L. c.161A, §19A provides that M.G.L. c.150A, §5 applies to the MBTA and its employees.[1] Similarly, Chapter 760 of the Acts of 1962 provides that M.G.L. c.150A applies to the Massachusetts Turnpike Authority, the Massachusetts Port Authority, the Massachusetts Parking Authority, and the Wood's Hole, Martha's Vineyard and Nantucket Steamship Authority.[2] *See also*, Chapter 775 of the Acts of 1975 (Massachusetts Municipal Wholesale Electric Company covered by M.G.L c.150A).

Prior to 1981, the definition of "employer" or "public employer" did not include "other political subdivision[s]" and did not contain exclusions for the MBTA and those authorities listed in Chapter 760 of the Acts of 1962. Even without the specific exclusions, however, the Commission historically applied the applicable provisions of M.G.L. c.150A to the MBTA

[1] Because M.G.L. c.150A, §5 refers only to the selection of an exclusive representative, the Commission has determined that it lacks jurisdiction over alleged unfair labor practices in violation of M.G.L. c.150A in matters involving the MBTA and its employees. *See*, *Frederick D. Cooney*, No. UPL-81, UP-2322 (July 9, 1976).

[2] Although the underlying policies in both M.G.L. c.150A and M.G.L. c.150E are identical, there are differences in the application of the two laws. *See*, *e.g*. paragraph E(3)(2), below (period during which a representation petition may be filed different); paragraph B(4), below (certain professional employees excluded from definition of employee in M.G.L. c.150A, §2).

and those authorities listed in Chapter 760 of the Acts of 1962. *See e.g*., *Massachusetts Port Authority*, 5 MLC 1844 (1979). The Commission has also determined that, because M.G.L. c.121B, §29 grants bargaining rights to housing authority employees pursuant to M.G.L. c.150E, by implication, housing authorities are public employers within the meaning of M.G.L. c.150E, §1. *Fall River Housing Authority*, 8 MLC 2038 (1982); *See also*; *Springfield Housing Authority v. Labor Relations Commission*, 16 Mass. App. Ct. 653 (1983). However, other authorities were historically excluded. In *Fall River Redevelopment Authority*, 4 MLC 1690 (1978), the Commission refused to exercise jurisdiction over a redevelopment authority on the ground that the employer was not within the definition of "public employer," and the Commission lacked any other statutory basis for exercising jurisdiction.

Chapter 484 of the Acts of 1981 amended M.G.L. c.150E, §1 to include "other political subdivision[s]" and to specifically exclude authorities created pursuant to M.G.L. c.161A (MBTA) and those authorities included under the provisions of Chapter 760 of the Acts of 1962. Thereafter, in *Geriatric Authority of Holyoke*, 12 MLC 1571 (1986), the Commission determined that, because the particular entity was created by the legislature as a "public body corporate and politic," and was a political subdivision, the entity was a public employer within the meaning of M.G.L.c.150E, §1. In making that determination, the Commission found that the 1981 amendment "was intended to include authorities" within the definition of "employer" or "public employer." 12 MLC at 1576.

(d) School Departments

In the case of school employees, the municipal employer is represented by the school committee or its designated representative.[3] A municipal school committee is not a separate legal entity, but rather is the agent of the municipality for the purpose of dealing with school employees. *City of Malden*, 23 MLC 181 (1997). Therefore, a municipality and a school committee are a single entity and share responsibility for making and fulfilling contractual commitments. *Id*.

A regional school committee is the public employer of employees of the regional school district. In school districts composed of more than one school committee, the district may function as a "single" employer for the purposes of collective bargaining. *Nauset Regional School District*, 5 MLC 1453 (1978); *Freetown-Lakeville School Committee*, 11 MLC 1508 (1985). In *Shore Collaborative*, 7 MLC 1351 (1980), and *South Shore Educational Collaborative*, 7 MLC 1356 (1980), the Commission concluded that

[3] Section 62 of the Education Reform Act of 1993, Chapter 71 of the Acts of 1993, amended the definition of "employer" or "public employer" in M.G.L. c.150E, §1 to require the chief executive officer of a city or town or his/her designee to participate and vote as a member of the city or town school committee; provided, however, that if there is no town manager or town administrator in a town, the chairman of the board of selectmen or his/her designee shall so participate and vote.

communities that are members of a collaborative, through their respective school committees, have a single-employer relationship with employees of the collaborative.

(e) Other Employers; Control Test

As stated in paragraph A(1), above, the preemptive nature of the NLRA requires the Commission to defer action until the NLRB specifically declines jurisdiction. However, if the NLRB declines jurisdiction, the Commission will determine whether to apply M.G.L. c.150A or M.G.L. c.150E by determining whether the employer is a public or private empoyer. To determine whether an enterprise is a "public employer" within the meaning of M.G.L. c.150E, §1, the Commission considers factors like the identity and control of the enterprise's board of managers, the nature of the employer's corporate structure, and the identity of the titleholder to the enterprise's real property. *Franklin Institute of Boston*, 12 MLC 1063 (1985); *Bourne Recreation Authority*, 28 MLC 98 (2001).

Whether a particular entity is the "employer" of the employees involved depends on whether the entity is controlled by the public employer to such a substantial degree that employees of the entity can be considered to be employees of the public employer. In *Worcester School Committee*, 13 MLC 1471 (1987), the Commission considered the following factors in determining that the Worcester School Committee was the employer of certain employees in the Worcester Head Start Program: 1) whether the entity hired employees; 2) whether the entity had authority to unilaterally discipline, transfer and/or discharge employees; 3) whether the entity set the wage rates; 4) whether the entity determined job assignments; 5) whether the entity paid the employees; and 6) whether the entity was liable for reporting and remitting deductions for social security, unemployment taxes, federal and state taxes. 13 MLC at 1482. *Cf*. *Hudson Bus Lines*, 4 MLC 1630 (1977)(private bus company, not school committee was "employer" of bus drivers who transport school children). *See also*, *Higher Education Coordinating Council*, 23 MLC 194 (1997)(Higher Education Coordinating Council (now Board of Higher Education) exercises sufficient control over certain individuals to establish that it, not a "Leadership Committee" comprised of members appointed by the Department of Education, is employer); *Commonwealth of Massachusetts*, 23 MLC 117 (1996)(the Commonwealth is not the "employer" of security and law enforcement personnel assigned to certain military installations jointly operated by the United States Government and the Commonwealth, through its adjutant general, because the commissioner of administration and finance does not exercise sufficient control over terms and conditions of employment).

Using a similar analysis, the Commission has concluded that certain retirement boards that operate with complete fiscal and administrative autonomy from the city in which they are located are separate "employers" of their own employees. *City of Brockton*, 19 MLC 1139 (1992).

(2) "Employee"

M.G.L. c.150E, §1 defines the term "employee" or "public employee" as "any person in the executive or judicial branch of a government unit employed by a public employer," with certain specified exceptions. Those exceptions are:

- elected officials, appointed officials, members of any board or commission, representatives of any public employer, including the heads, directors and executive and administrative officers of departments and agencies of any public employer, and other managerial employees or confidential employees;

- members of the militia or national guard[4];

- employees of the Labor Relations Commission; and officers and employees within the departments of the State Secretary,[5] State Treasurer,[6] State Auditor and Attorney General.[7]

See also, paragraph B(1)(b), above, for a discussion about certain excluded authorities.

The Commission has broadly interpreted the terms "employee" or "public employee" to encompass all individuals employed by a public employer, except those specifically excluded. *City of Fitchburg*, 2 MLC 1123 (1975); *City of Gloucester*, 26 MLC 128 (2000). The Commission has defined "employee" to include: regularly employed part-time employees, *Board of Regents*, 14 MLC 1589 (1988), part-time reserve police officers, *Town of Newbury*, 14 MLC 1660 (1988), per diem substitute teachers, *Boston School Committee*,

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[4] *But see*, *Commonwealth of Massachusetts*, 6 MLC 1976 (H.O. 1980), *aff'd*, 7 MLC 1740 (1981)(Commission considers M.G.L. c.33, §4, which defines "militia" as enlisted personnel, and concludes that "armorers," which are "[f]or all intents and purposes" civilian janitors and custodians, are employees within the meaning of M.G.L. c.150E, §1).

[5] Although M.G.L. c.150E, §1 excludes employees of the Department of the State Secretary from the definition of employee, Chapter 48 of the Acts of 1997, as amended by Chapter 300 of the Acts of 1998, transferred certain former county registry of deeds employees to the Secretary of the Commonwealth and provided that those transferred employees retained their bargaining rights under M.G.L. c.150E. *See*, Chapter 48, Section 11(b) of the Acts of 1997; paragraph B(1)(a), above.

[6] Except for employees of the State Lottery Commission.

[7] Pursuant to Chapter 110, Section 269(b) of the Acts of 1993, certain employees transferred from the Department of Labor and Industries to the Office of the Attorney General are considered public employees within the meaning of M.G.L. c.150E, §1.

7 MLC 1947 (1981), call fire fighters, *Town of Leicester*, 9 MLC 1014 (1981); *Town of Wenham*, 23 MLC 82 (1996), *aff'd sub nom*., *Town of Wenham v. Labor Relations Commission*, 44 Mass. App. Ct. 195 (1998), visiting lecturers, *Board of Regents*, 11 MLC 1486 (1985), full-time students, *Quincy Library Department*, 3 MLC 1517 (1977), graduate teaching and research assistants, *Board of Trustees, University of Massachusetts*, 20 MLC 1453 (1994), and undergraduate resident assistants and community development assistants, *Board of Trustees of the University of Massachusetts*, 28 MLC 225 (2002).

Probationary employees, *City of Fitchburg*, 2 MLC 1123 (1975), employees classified as temporary or provisional employees under Civil Service law, M.G.L. c.31, *Boston School Committee*, No. MUP-9067 (March 2, 1994), *aff'd sub nom*., *School Committee of Boston v. Labor Relations Commission*, 40 Mass. App. Ct. 327 (1996), *further app. rev. denied*, 422 Mass. 1111 (1996), and seasonal employees,[8] *Town of Wellfleet*, 11 MLC 1238 (1984), are employees within the meaning of M.G.L. c.150E, §1.

Unlike the National Labor Relations Act (NLRA), neither M.G.L. c.150E, §1 nor M.G.L. c.150A, §2 exclude supervisory employees from the respective definitions of employee. For a discussion about the differences between *supervisory* and *managerial* employees, *see* paragraphs B(2)(b) and D(3), below. For a discussion about the appropriateness of placing supervisors in bargaining units with employees whom they supervise, *see* paragraph D(3), below.

(a) Independent Contractors

Independent contractors are not employees under either M.G.L. c.150E or M.G.L. c.150A. However, where individuals perform a service for a public employer for compensation and with supervision, the Commission will recognize, as a rebuttable presumption, that an employment relationship exists. *Board of Regents*, 11 MLC 1486 (1985). That presumption can be rebutted by evidence demonstrating that the employer does not retain "control" over the worker. When considering whether the employer retains sufficient control over the worker, the Commission examines the duties of the workers, the type of supervision they receive, the method in which they are paid, and the manner in which they are treated by the employer. *Id*.; *See also*, *Massachusetts Interscholastic Athletic Association*, 16 MLC 1706 (H.O. 1990), *aff'd* 17 MLC 1388 (1991); *City of Boston*, 24 MLC 73 (1998). Rather than categorically exclude all persons compensated from the state budgetary "03" (contracted employees subsidiaries) account, the Commission has concluded that it is more appropriate to apply the well-settled legal standards which differentiate employees from independent contractors on a case-by-case basis. *Board of Regents*, 13 MLC 1347 (1986).

[8] For a discussion about the appropriateness of placing seasonal employees in a bargaining unit with regular employees, *see*, paragraph, D(1)(b), below.

(b) Managerial Employees

M.G.L. c.150E, §1 excludes *managerial employees* from the definition of "employee." However, the Commission has consistently interpreted the titles listed in M.G.L. c.150E, § 1 as examples of managerial classifications, rather than as positions to be excluded without regard to the exercise of managerial authority. *See, City of Chicopee*, 19 MLC 1765 (1993), *aff'd sub nom. City of Chicopee v. Labor Relations Commission*, 38 Mass. App. Ct. 1106 (1995).

M.G.L. c.150E, §1 defines a managerial employee as only one who:

- participates to a substantial degree in formulating or determining policy; or
- assists to a substantial degree in the preparation for or the conduct of collective bargaining on behalf of a public employer; or
- has a substantial responsibility involving the exercise of independent judgment of an appellate responsibility not initially in effect in the administration of a collective bargaining agreement or in personnel administration.

To be excluded as managerial, an employee must satisfy to a substantial degree any of the three statutory criteria. *Lee School Committee*, 3 MLC 1496 (1977); *Taunton School Committee*, 1 MLC 1480 (1975).

To satisfy the first criterion, an employee must participate with regularity in the process that results in a decision to put a policy into effect. *Town of Agawam*, 13 MLC 1364 (1986). Unlike supervisory personnel who "transmit policy directives to lower level staff and, within certain areas of discretion, implement the policies," managerial employees "make the [policy] decisions and determine the objectives." *Wellesley School Committee*, 1 MLC 1299 (1975), *aff'd sub nom.*, *School Committee of Wellesley v. Labor Relations Commission,* 376 Mass. 112 (1978). Neither limited participation in the decision-making process, nor attending and participating in policy-making discussions is sufficient to consider an employee managerial, if the input is merely informational or advisory in nature. *Barnstable County*, 26 MLC 183 (2000); *Town of Medway*, 22 MLC 1261 (1995); *Town of Wellfleet*, 11 MLC 1238 (1984); *Wellesley School Committee*, 1 MLC 1299 (1975), *aff'd sub nom.*, *School Committee of Wellesley v. Labor Relations Commission,* 376 Mass. 112 (1978). A managerial employee's authority "includes not only the authority to select and implement a policy alternative, but also regular participation in the policy decision-making process." *Town of Plainville*, 18 MLC 1001 (1991), *citing Town of Agawam*, 13 MLC 1364 (1986). Finally, the policy decision must be of major importance to the mission and objectives of the public employer. *Id*.

To satisfy the second criterion, the employee must have a voice in determining bargaining strategy or the conditions for settlement. *City of Quincy*, 13 MLC 1436 (1987); *Wellesley School Committee*, 1 MLC 1389 (1975), *aff'd sub nom. School Committee of*

Wellesley v. Labor Relations Commission, 376 Mass. 112 (1978). The employee must be directly involved in preparing and formulating the employer's proposals or positions in collective bargaining. *Town of Agawam*, 13 MLC 1364 (1986). Mere consultation concerning the implications or feasibility of proposals is not sufficient. *Id*. Administrators who review contract proposals concerning the teachers' bargaining unit in order to prevent a possible adverse impact on their own employment do not substantially participate in collective bargaining. *Town of Holbrook*, 1 MLC 1468 (1975).

The third statutory criterion concerns the exercise of independent judgment of an appellate responsibility. Judgment is independent when it lies within the employee's sole discretion, without the need to consult with a higher authority. *Town of Agawam*, 13 MLC 1364 (1986). Further, the judgment exercised must be significant. *Id*. Mere participation in the adjustment of grievances, without appellate responsibility over such grievances, does not meet the standard for managerial status. *City of Quincy*, 13 MLC 1436 (1987). Similarly, authority to select among applicants to fill a vacancy does not make an employee managerial when the authority to determine whether or not to fill the vacancy resides in a higher authority. *Id*.

Unlike M.G.L. c.150E, M.G.L. c.150A neither defines nor excludes managerial employees from coverage. *Massachusetts Bay Transportation Authority*, 22 MLC 1111 (1995). However, the Commission has historically excluded managerial employees from coverage under M.G.L. c. 150A. *See*, *Id.* In *Brookline Hospital,* CR-3402 (January 28, 1974) the Commission applied a standard similar to the standard contained in M.G.L. c.150E, §1 to determine whether certain employees were managerial employees and, therefore, excluded from coverage under M.G.L. c.150A.

To determine whether an employee falls within the managerial exclusion, the Commission scrutinizes the employee's actual duties and responsibilities rather than job descriptions or duties that may be performed in the future. *Town of Bridgewater*, 15 MLC 1001 (1988). Job titles, or the inclusion of an employee on a particular pay scale, are not determinative. *See*, *Massachusetts Bay Transportation Authority v. Labor Relations Commission*, 425 Mass. 253 (1997); *Commonwealth of Massachusetts*, 25 MLC 121 (1999); *Masconomet Regional School District*, 3 MLC 1034, 1040 (1976). Finally, a managerial employee's discretionary delegation of managerial tasks to an immediate subordinate does not confer managerial status on the subordinate where the latter's participation is at the sufferance of the managerial employee rather than as an exercise of actual authority within the organizational hierarchy. *Town of Bridgewater*, 15 MLC 1001 (1988).

(c) Confidential Employees

M.G.L. c.150E, §1 excludes *confidential employees* from the definition of "employee." A confidential employee is defined as an employee who directly assists and acts in a confidential capacity to a person or persons otherwise excluded from coverage.

The Commission applies the confidential exclusion narrowly and balances the broad extension of collective bargaining rights against the potential danger of disrupting the employer's operations. *Silver Lake Regional School Committee*, 1 MLC 1240 (1975). An employee must have a continuing and substantial relationship with a managerial employee of such a nature that there is a legitimate expectation of confidentiality in their routine and recurring dealings. *Town of Agawam*, 13 MLC 1364 (1987); *Littleton School Committee*, 4 MLC 1405 (1977). However, employees may directly assist excluded employees without assisting them in a confidential capacity. *University of Massachusetts*, 3 MLC 1179 (1976). Thus, a managerial employee's reliance upon another employee as a conduit for policy advice and personnel recommendations does not, standing alone, render the latter a confidential employee. *Id*. Similarly, access to sensitive material, like financial data, personnel records, or medical records and audits, without more, does not necessarily make an employee confidential. *Town of Milton*, 8 MLC 1234 (1981); *Wellesley School Committee*, 1 MLC 1389 (1975), *aff'd sub nom*. *Town of Wellesley v. Labor Relations Commission*, 376 Mass. 112 (1978). Occasionally substituting for an absent employee and performing confidential functions does not make the substituting employee confidential. *Town of Wellfleet*, 11 MLC 1238 (1984). By contrast, employees who as a matter of course have access to all or substantially all of the collective bargaining proposals prior to their submission to the employees' bargaining agent have been excluded as confidential. *City of Quincy*, 13 MLC 1436 (1987). Similarly, employees who regularly type contract proposals for use by the employer in collective bargaining negotiations have been excluded as "confidential." *Silver Lake Regional School Committee*. 1 MLC 1240 (1975). Secretaries to school superintendents and school committees have generally been excluded. *Belchertown School Committee*, 1 MLC 1304 (1975); *Framingham Public Schools*, 17 MLC 1233 (1990). The wife of a police chief was excluded from a bargaining unit that worked under the direction of her husband. *Town of Plympton*, 5 MLC 1410 (1978).

Unlike M.G.L. c.150E, M.G.L. c.150A neither defines nor excludes confidential employees. However, the Commission has excluded confidential employees under M.G.L. c.150A. *See*, *e.g*. *Old Colony Elderly Services, Inc*., 6 MLC 1893 (1980).[9]

(d) Other Excluded Employees

The Commission has determined that legislative employees, *City of Lawrence*, 13 MLC 1632 (1987); *City of Somerville*, 23 MLC 256 (1997), employees of the Massachusetts Defenders Committee (now, Office of Public Counsel), *Commonwealth of Massachusetts, Chief Administrative Justice,* 5 MLC 1699 (1979), the non-legal staff of the Committee for Public Counsel Services, *Committee for Public Counsel Services*, 20 MLC 1201 (1993), mediators of the Board of Conciliation and Arbitration, *Commonwealth of Massachusetts*, 6

[9] Although in *Old Colony Elderly Services, Inc* the Commission described the appropriate unit as: "[a]ll case managers, excluding the executive director, supervisors of case managers, managerial and *confidential employees*, and all other employees," whether there were or were not confidential employees in the bargaining unit was not an issue before the Commission.

MLC 1918 (1980), and prisoners, *Commonwealth of Massachusetts*, SCRX-2 (September 24, 1973), are not employees within the meaning of M.G.L. c.150E, §1.

(3) Professional Employees

M.G.L. c.150E, §1 defines a professional employee as an employee engaged in work:

- predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work,
- involving the consistent exercise of discretion and judgment in its performance,
- of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, and
- requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes.

For an employee to be considered a professional employee within the meaning of M.G.L. c.150E, §1, all four criteria must be met. *Commonwealth of Massachusetts*, 10 MLC 1162 (1983). The mere performance of intellectual and varied work, even if it cannot be standardized by time, will not alone qualify an employee as professional. *City of New Bedford*, 3 MLC 1159 (1976).

Like the analysis to determine whether an employee is a managerial employee, see, paragraph B(2)(b), above, the Commission analyzes the employees' actual job duties to determine whether an employee is a professional employee. However, by way of example, the Commission has determined that the following employees are professional employees: accountants, *City of Springfield,* 5 MLC 1170 (1978); librarians, *Town of Braintree,* 5 MLC 1133 (1978); *Town of Rockland,* 15 MLC 1325 (1989); physical therapists, *City of Worcester,* 6 MLC 1104 (1979); and the social workers, nurses and certain teachers, coordinators, supervisors, and therapists in a Head Start school program, *Worcester School Committee,* 13 MLC 1471 (1987).

The Commission has determined that the following are not professional employees: licensed practical nurses, *Plymouth County Hospital,* 1 MLC 1255 (1975); teachers at a child care center, *Wesley Child Care Center,* 1 MLC 1098 (1974); home care case managers, *Old Colony Elderly Services,* 6 MLC 1893 (1980); and court reporters, *Commonwealth of Massachusetts,* 10 MLC 1162 (1983). Although exhibiting some of *the* qualifications of professional employees, technical employees have been classified as non-

professional. *See*, *City of Worcester,* 6 MLC 1104 (1979) (respiratory therapists and physical therapy assistants).

M.G.L. c.150E, §1 also defines professional employee to include a detective, member of a detective bureau or police officer who is primarily engaged in investigative work in any city or town police department that employs more than four hundred (400) people.

M.G.L. c.150A does not contain a definition of professional employee. However, the Commission has used the definition contained in M.G.L. c.150E to determine whether certain employees were professional employees within the meaning of M.G.L. c.150A. *See*, *Old Colony Elderly Services,* 6 MLC 1893 (1980).

Unless otherwise excluded (*e.g*. as a managerial or confidential employee), professional employees are included in the definition of employee in M.G.L c.150E. However, for purposes of unit placement, they are handled differently. For a discussion about the Commission's statutory obligations when placing professional employees in bargaining units with non-professional employees, *see* paragraph D(4), below. Finally M.G.L. c.150A, §2 defines employee to include any nurse or nonprofessional employee of a health care facility or of any nonprofit institution. Therefore, certain professional employees of health care facilities or nonprofit institutions are excluded from the definition of employee and are excluded from coverage under M.G.L. c.150A. *Id*.

(4) Employee Organization

M.G.L. c.150E, §1 defines an employee organization as "any lawful association, organization, federation, council or labor union, the membership of which includes public employees and assists its members to improve their wages, hours, and conditions of employment." The definition is purposely broad and does not require any specific kind of organizational structure. *Commonwealth of Massachusetts (Unit 6)*, 10 MLC 1557 (1984); *City of Lawrence*, 4 MLC 1851 (1978). The Commission's focus is whether the purpose of employee organization is to represent employees for the purpose of collective bargaining. *Boston Water and Sewer Commission*, 7 MLC 1439 (1980). *See*, *also*, *Blue Hills Regional Technical School District*, 9 MLC 1271 (1982). Organizations that petition the Commission for a representation election have been found to meet the statutory definition although they have had no by-laws, constitution, officers, dues, or any prior history of bargaining. *Town of Haverhill/Hale Hospital*, 15 MLC 1334, 1336 (1989); *Commonwealth of Massachusetts (Unit 6)*, 10 MLC 1557 (1984). *Cf*., *Massachusetts Bay Transportation Authority*, 6 MLC 2086 (1980). Whether an organization has met reporting or filing requirements that may exist outside M.G.L. c.150E is not relevant to the question of its status as an employee organization under Section 1 of the Law. *Commonwealth of Massachusetts (Unit 4)*, 15 MLC 1380, 1383 (1989); *IBPO*, 1 MLC 1225 (1974).